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286-840—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 901

JOSEPH T. STRONG, D/B/A STRONG ROOFING & INSULATING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The Board's decision and order are reported at 152 NLRB 9 (Pet. App. B).

JURISDICTION

The judgment of the court of appeals, enforcing the Board's order except in one respect (see *infra*, pp. 5–6), was entered on July 14, 1967 (Pet. App. A, p. 1). On October 5, 1967, Mr. Justice Douglas extended the Company's time for filing a petition for certiorari to and including December 11, 1967 (Pet. 2), and the pe-

tition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and 29 U.S.C. 160(e).

QUESTION PRESENTED

Section 10(b) of the National Labor Relations Act bars the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *." The question presented is whether Section 10(b) precludes the Board from proceeding against an employer's refusals to execute and honor a multi-employer bargaining agreement which occurred within the six-month limitations period, merely because the initial rejection of the contract occurred prior to that period.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Joseph T. Strong, an individual proprietor doing business under the trade name of Strong Roofing & Insulating Co., is engaged in the roofing of residential and commercial buildings (R. 12).[1] As a regular member of the Roofing Con-

[1] "R." references are to Vol. I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Vol. II; "G.C. Exh.", "R. Exh.," and "T.X. Exh." references are to exhibits of the General Counsel, respondent, and

tractors Association of Southern California, petitioner was bound by any collective bargaining agreements between the Association and the Union,[2] which represented a multi-employer bargaining unit comprised of the employees of the Association's regular members[3] (R. 14; Tr. 13, 37). On August 14, 1963, the Association and the Union agreed upon the terms of a new four-year agreement, to be effective from August 15, 1963, to August 15, 1967 (R. 15; Tr. 16, 35).

On August 20, 1963, Strong wrote to the Joint Labor Relations Board, a grievance board composed of contractor and union representatives, requesting termination of the contract and the refund of his security deposit (R. 15; Tr. 22, 66, 67, R. Exh. 3).[4] The Joint Board turned the letter over to the Association's representative without further action (R. 15; Tr. 22–24). In September 1963, Strong asked the

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Trial Examiner, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association.

[3] The Association's By-laws provide (G.C. Exh. 2, p. 9):

> Each and every regular member shall recognize the Association, its counsel, and each of its duly selected labor committees as the member's exclusive bargaining representatives for negotiating, reaching, agreeing to abide by, and/or signing any and all collective bargaining agreements with labor unions. * * * Any such labor contract negotiated by the Committee shall be binding upon the regular members of this Association separately and collectively.

[4] The Master Agreement required that regular members deposit $400 with the Association to insure payment of wages and fringe benefits due under the contract (R. 15; Tr. 14–15, 22–23, T.X. Exh. 1, G.C. Exh. 4).

Association to change his status from that of a regular member to that of an associate contractor (R. 16; Tr. 14–15).[5] He continued, however, to pay regular members' dues until December 1963 (R. 16; Tr. 20, G.C. Exh. 3). He also paid fringe benefits to the Union Roofers Trust Fund in September and October of that year (R. 15; Tr. 69, 78, 88, G.C. Exh. 5 (a) and (b)).

On October 18, 1963, a Union representative asked Strong's wife, who managed the Company's office, to have Strong sign the new Association contract (R. 16; Tr. 90–91). Mrs. Strong stated that her husband had withdrawn from the Association and would not sign (R. 16; Tr. 90–91). On December 10, 1963, the Union again requested that Strong sign the contract, threatening a work stoppage if he persisted in his refusal. Mrs. Strong again replied that her husband would not sign the contract, and added that the Company no longer employed any Union members (R. 16; Tr. 37, 51–52, 72–73, 84–85, 92). During the same month, the Association credited Strong's account with an amount equal to the difference between regular and associate membership dues for the months of October, November, and December (R. 16; Tr. 20, G.C. Exh. 3). In January 1964, it returned his security deposit (R. 16; Tr. 23, 70). In April 1964, Strong again rejected a Union request that he sign the contract (R. 16; Tr. 51–52, 72–73).

[5] Under the By-laws of the Association, associate contractors are members who operate non-union shops and are not covered by the Association's collective bargaining agreement (R. 14; Tr. 24–25, G.C. Exh. 2).

On June 3, 1964, the Union filed unfair labor practice charges with the Board, alleging that Strong's refusal to sign the new Association contract constituted a refusal to bargain, in violation of Section 8(a) (5) and (1) of the Act (Pet. App. B, p. 3, n. 1).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

The Board found that Strong's attempt to withdraw from the multi-employer bargaining unit was untimely, and that accordingly Strong's refusal, on and after April 1964, to sign and honor the 1963 Association agreement constituted a refusal to bargain with the Union, in violation of Section 8(a) (5) and (1) of the Act (Pet. App. B, pp. 11–12). The Board rejected petitioner's contention that, since the first refusal to sign the contract occurred in October 1963, more than six months prior to the filing of the unfair labor practice charge, Section 10(b) of the Act barred issuance of a complaint based upon subsequent refusals within the statutory limitations period (Pet. App. B, p. 5, n. 2). The Board ordered Strong to cease and desist from the unfair labor practices found, to execute and honor the 1963 agreement between the Union and the Association; to pay to the appropriate source any fringe benefits provided for in the contract; and to post appropriate notices (Pet. App. B, pp. 14–15).

The court of appeals sustained the Board's findings, and enforced its order, except for the requirement that petitioner pay to the appropriate source

any fringe benefits provided for in the contract (Pet. App. A).

ARGUMENT

Petitioner's sole contention is that, since the initial refusal to sign the contract took place in October 1963, more than six months before the filing of the charge, Section 10(b) of the Act prevented the Board from proceeding against the subsequent refusals to bargain which occurred within the six-month period. The Board and the court below properly rejected this contention. The case is not an appropriate one for review by this Court.

The essence of petitioner's argument appears to be that his initial refusal to sign the contract was a complete and final renunciation of his duty to recognize and bargain with the Union, which initiated the running of the statutory period with respect to any charge that he had violated Section 8(a)(5) of the Act. This argument is premised upon an erroneous interpretation of an employer's duty to bargain with the representative of his employees. Section 8(a)(5) imposed a continuing duty on petitioner to bargain with the Union during the term of the 1963 agreement with respect to the matters set out in Section 8(d) of the Act.[6] *National Labor Relations Board* v. *Acme*

[6] Section 8(d) (29 U.S.C. 158(d)) provides, in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract

Industrial Co., 385 U.S. 432, 436. The evidence shows, and petitioner does not deny, that on two occasions during the six-month period preceding the filing of the charge he refused to execute and honor a collective bargaining agreement negotiated on his behalf by a multi-employer association. As the court below held, each of these refusals "in and of itself constitutes, as a substantive matter, [an] unfair labor practice" (Pet. App. A, p. 4).

Contrary to petitioner's assertion, the decision below is not in conflict with this Court's decision in *Local Lodge No. 1424, IAM* v. *National Labor Relations Board* (*Bryan Mfg. Co.*), 362 U.S. 411. In that case the Board found that the enforcement of the union shop clause of a collective bargaining agreement was an unfair labor practice because the union did not represent a majority of the employees at the time the contract was executed, almost a year prior to the filing of a charge. The Court held, however, that the complaint was barred by Section 10(b) because the enforcement of the clause—the only event occurring within the 10(b) period—derived its unlawfulness solely from the unlawful execution of the contract with a minority union—an event which antedated the 10(b) period and which was time-barred as a basis for the Board's finding. In the present case, on the other hand, the unlawfulness of petitioner's two refusals to sign and honor the contract within the six-month period did not depend upon the unlawfulness of petitioner's conduct prior to that period.

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incorporating any agreement reached if requested by either party, * * *.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[9]

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JANUARY 1968.

[9] On September 22, 1967, the Board petitioned the court of appeals for rehearing *en banc* with respect to that part of its order which was denied enforcement, and the Board's petition is still pending. The issue presented by the instant petition is independent of the issue raised in the Board's petition for rehearing *en banc*. Accordingly, this Court may rule on the petition for certiorari without awaiting the decision of the court of appeals.

U.S. GOVERNMENT PRINTING OFFICE: 1968